BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 01-92
	)	
Developing a Unified Intercarrier Compensation Regime	)	

REPLY COMMENTS OF ALLEGIANCE TELECOM, INC.

Allegiance Telecom, Inc. ("Allegiance") submits these replies to the initial comments filed in the *Intercarrier Compensation* rulemaking proceeding.[1]

I. Introduction

Virtually all of the initial comments share a common theme: neither BASICS nor COBAK will be effective in eliminating the potential for regulatory arbitrage, which is one of the Commission's primary justifications for proposing to restructure the existing calling party's network pays ("CPNP") intercarrier compensation regime. A broad cross-section of parties filing comments – carriers, state commissions and public interest advocates – identified numerous faults with a federally mandated bill-and-keep scheme and urged the Commission to reevaluate the bill-and-keep proposals set forth in the *NPRM*. Significantly, commenters that have no financial interest in the intercarrier compensation proposals under consideration in this proceeding, such as the Maryland Office of People's Counsel, the Texas Office of the Public Utility Counsel and the National Association of State Utility Consumer Advocates, are among the most vocal critics of a federally mandated bill-and-keep intercarrier compensation regime.

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[1] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. Apr. 27, 2001) ("*Intercarrier Compensation NPRM"* or "*NPRM").*

The well reasoned arguments put forth by these entities demonstrate that federally mandated bill-and-keep would have a deleterious effect on competition and would, therefore, be contrary to the public interest. Given their non-carrier status, the comments of these public interest advocates are entitled to substantial weight.

II. The Public Interest Advocates Are Impartial Parties Whose Views Are Entitled To Substantial Weight

The public interest advocates that have come forward in this proceeding are uniquely situated to provide balanced and impartial critiques of the Commission's proposals because they do not represent carriers or other entities with a vested interest in the telecommunications industry. At least three such groups filed comments on the *NPRM* – the Maryland Office of People's Counsel ("MD OPC"), the National Association of State Utility Consumer Advocates ("NASUCA"), and the Office of the Public Utility Counsel of Texas ("OPUCT"). The MD OPC is an independent state agency that represents residential customers in utility matters and, according to its website, it is the "oldest consumer advocacy office of its kind in the United States."[2] NASUCA is an association of 42 advocate offices in 40 states and the District of Columbia whose members "are designated by laws of their respective states to represent the interest of utility consumers before state and federal regulators and in the courts."[3] Similarly, OPUCT represents Texas residential and small commercial telephone consumers in proceedings before Texas and federal agencies and the courts. OPUCT's goal is to "ensure that Texas consumers are effectively and efficiently served by high-quality professionals and businesses by setting clear standards, maintaining compliance, and seeking market-based standards."[4]

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2 *See* http://www.opc.state.md.us/about/about.html .

3 *See* http://www.nasuca.org/web/about/about_nasuca.htm .

4 *See* http://www.opc.state.tx.us/Purpose.htm .

Each of these three public interest advocates expresses vehement opposition to the bill-and-keep proposals in the *NPRM*. MD OPC at 2 (concluding that both staff proposals in the *NPRM* are fatally flawed), NASUCA at 3 (expressing categorical opposition to the *NPRM* proposals), OPUCT at 34 ("undesirable outcomes of the FCC's approach . . . cannot be overstated"). Allegiance agrees with OPUCT's analysis that the proposals in the *NPRM*:

> seem to be narrowly tailored around a few perceived problems, such as the one-sided compensation payments for ISP-bound traffic, and to ignore the broader context of telecommunications policy, such as the promotion of competition and universal service. To be sure, both competition and universal service will be imperiled under the FCC's mandatory bill-and-keep proposals.

Allegiance also supports OPUCT's recommendation that the Commission shift its focus away from attempting to justify a requirement that carriers terminate the traffic of other carriers under a bill-and-keep scheme and instead concentrate on principles that will encourage market entry and the development of competition, especially facilities-based competition:

> OPUCT believes that in the long run society's interests are better served by a three pronged approach: TELRIC-based rates for all intercarrier wholesale transactions; vigorous promotion of competition; and efficient, adequate and competitively neutral universal service policies.

(OPUCT at 48) Chairman Powell recently noted that the Commission's duty "is to exercise independent judgment that advances the *public* interest, rather than the interests of one side or the other."[5] As it exercises its independent judgment to determine whether to abandon the TELRIC principles for intercarrier compensation that have formed the foundation of its local competition policies since 1996, the Commission should accord substantial weight to the views of the public interest advocates.

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[5] *Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166*, Separate Statement of Chairman Michael K. Powell, 2 (rel. Oct. 11, 2001).

III. Bill-and-Keep Would Not Promote Competition

The public interest advocates drive home the basic theme of the Telecommunications Act of 1996 ("1996 Act") by reminding the Commission that the public will be best served when all segments of the telecommunications industry become subject to robust competition. They also persuasively demonstrate the very strong likelihood that the federally mandated bill-and-keep proposals in the *NPRM* will thwart, rather than promote, competition. OPUCT best summarizes one of the fundamental analytical flaws of the *NPRM* in a simple chart:

Traffic Imbalance	Payment Flows	Evaluation	Policy Recommendation
ILECs terminate more traffic to CLECs	ILECs pay money	Bad	Free termination under bill and keep
CMRS terminate more traffic to ILECs	ILECs receive money	Good	"less of imperative to apply new regime"

(OPUCT at 98) MD OPC points out that had COBAK and BASICS been in effect in prior years, CLECs probably would not exist. (MD OPC at 14) NASUCA rounds out the public interest perspective by summing up its position as follows: "there is not a shred of evidence that the proposed changes would be in the 'public interest.'" (NASUCA at 15) In the face of such strong opposition from not only the industry, but also the public interest advocates, the Commission should abandon its proposal to mandate bill-and-keep for intercarrier compensation.

IV. If Bill-and-Keep Made Economic Sense, the Industry Would Adopt It without a Mandate from the Commission

NASUCA argues that bill-and-keep is "inconsistent with the pricing behavior of competitive, unregulated markets and will impede the development of competing technologies." (NASUCA at 7) It suggests that the Commission look at other industries for evidence that bill-

and-keep is uneconomic.[6] With few exceptions for cash on delivery packages, the Post Office, Federal Express, and United Parcel Service have always charged the sender and have never proposed to charge the recipient. (NASUCA at 8; *see also* Allegiance at 3) Because only the calling party is in a position to know the content and therefore the benefit of a call, and because rational decision-making requires a comparison of costs and benefits, MD OPC opines that the bill-and-keep proposals in the *NPRM* are economically irrational. (MD OPC at 24-26) While a called party may be an "accomplice," any assignment of costs, whether 50/50 or otherwise, under a benefit theory is arbitrary because regulators cannot truly measure the relative benefits of a call (nor should they put themselves in that position). (OPUCT at 55-57) As NASUCA argues, although the recipient may benefit from some calls, "it is impossible to say how the benefits of the call are shared, and therefore it is bad policy to assume that both parties benefit equally, and to base policy changes on this assumption." (NASUCA at 21)

NASUCA cites numerous other industries, including the credit card, airline, international electricity, tollway, and wire transfer industries, as examples of a "powerful trend in network economics – that the party which causes the increase in network costs pays" whether that party benefits 100% or shares the benefits with others. (NASUCA at 9-10) Large Internet operators peer on a bill-and-keep basis only when certain conditions are met, such as relatively balanced traffic and equality of capacity, whereas smaller operators pay the larger backbones for the privilege of interconnection by leasing lines. (NASUCA at 10, 14) Similarly, the roaming agreements used by cellular carriers provide for compensation rather than terminating other carriers' traffic for free. Even the interconnection arrangements that pre-dated the 1996 Act

[6] *See also*, TX PUC at 8-9 (noting that, after an extensive investigation, the TX PUC determined that current traffic volumes do not support bill-and-keep for the exchange of local traffic) and CA PUC at 4-5 (supporting bill-and-keep only if exceptions are made for out-of-balance traffic).

show that although carriers contractually adopted bill-and-keep in certain situations, the most prevalent arrangement was revenue sharing. (NASUCA at 7) In short, market realities support the proposition that bill-and-keep is not appropriate where the goods or services exchanged are not in balance.

From society's perspective, it is economically efficient for CLECs with spare network capacity to terminate fast-growing ISP-bound traffic. (OPUCT at 106) The Internet began expanding rapidly at the same time CLECs entered local markets seeking customers to serve. The new ISPs did not have long-standing relationships with ILECs, like many other local telephone customers. And CLECs offered ISPs collocation – a service ILECs refused to offer them. (NASUCA at 19-20) Thus the flow of reciprocal compensation payments merely shows that the markets are working – ISPs have chosen the providers that serve them best. (OPUCT at 26-28)

V. Mandating Bill-and-Keep Would Not Be Deregulatory in Any Respect

Economics aside, mandating bill-and-keep does not make regulatory sense either. As OPUCT argues, bill-and-keep would "fracture the consistency in regulatory policies" that apply TELRIC-based rates across important and interdependent aspects of telecommunications regulation, including universal service, alternative rate regulation, and unbundled network elements. (OPUCT at 10-11) The *NPRM* proposals "contradict the very essence" of the Commission's TELRIC methodology because they abandon the "minute of use is a minute of use" mantra that is so vital to a consistent pricing policy. (OPUCT at 14) If adopted, the *NPRM* proposals would result in switching and transport being priced differently depending on service specific circumstances, *e.g.*, whether the service being purchased was UNE switching or UNE transport or transport and termination to complete a call originated on another carrier's network.

By singling out reciprocal compensation for bill-and-keep, the *NPRM* arbitrarily ignores a host of other wholesale transactions involving the use of another carrier's network that are not "free," such as UNEs, transport, transiting, directory assistance, operator services, and billing services. (*see* OPUCT at 13) OPUCT submits that such inconsistencies in the application of cost concepts across UNEs, universal service, reciprocal compensation and alternative regulation could lead to serious problems that would eventually bring the so-called "unified" intercarrier compensation scheme down. (OPUCT at 14)

Since 1996, the Commission has spoken of universal service, access charges, and UNEs as three legs of a stool that are interdependent. By abandoning its goal of TELRIC-based pricing for reciprocal compensation and access charges, the Commission is essentially kicking one leg out from under the stool, thereby threatening to bring down what little competition is precariously sitting on top of it. As MD OPC argues, the Commission should not avoid rate setting just because it is difficult. Instead, regulators should replace charges that are excessive with charges that are reasonable. (MD OPC at iii) Costing issues for switching are no more perplexing than those associated with loops or interoffice transport and the Commission should not abandon its TELRIC pricing principles in any respect. (NASUCA at 17) Charges that are reasonable compensate the company for the costs it incurs, do not cause arbitrage, and do not require implicit subsidies. (MD OPC at 21)

As the commenters demonstrate, bill-and-keep would not minimize regulatory intervention and oversight. OPUCT faults the Commission for interrupting local market dynamics and using its regulatory powers to reduce reciprocal compensation payments from ILECs to CLECs in an *ad hoc* fashion through the *ISP-Bound Traffic Order*. (OPUCT at 33) NASUCA also faults the Commission for renouncing its dependence on competitive markets to

bring charges down and instead relying on regulation – namely mandating bill-and-keep – to reduce termination fees to zero. (NASUCA at 3) Furthermore, as MD OPC argues, because no single carrier would have end-to-end responsibility for a call under COBAK or BASICS, regulators would be forced to take responsibility and resolve numerous demarcation point issues. (MD OPC at 7-9) In addition, mandating bill-and-keep would not eliminate the terminating carrier's monopoly. Only the party paying the access charge would change – from the IXC to the end user – and regulators would still have to police the rate. (MD OPC at 36) For these and other reasons, the *NPRM* proposals would increase, rather than decrease, regulators' involvement in local markets.[7] (S*ee, e.g.,* Allegiance at 24-25)

Mandating bill-and-keep would also undermine, rather than promote, regulatory stability. OPUCT points out that with its *ISP-bound Traffic Order*, the Commission in one fell swoop severely undercut regulatory certainty by eliminating $2 billion in annual revenues from the CLEC industry. (OPUCT at 34) Because it changed the rules of engagement mid-stream, the Commission must take some responsibility for the meltdown of the competitive industry. (OPUCT at 5-6) As OPUCT warns, "a few more regulatory shocks and the issue of compensation between competing carriers for intercarrier traffic will be permanently resolved – there won't be any such traffic." (OPUCT at 37)

VI. Conclusion

As initial comments on the *NPRM* make clear, bill-and-keep does not appropriately balance the goals that the Commission should promote – competition, regulatory certainty, deregulation, and maintaining affordability of service for all consumers. For the reasons

[7] The Commission's proposals in the *NPRM* also threaten to interfere in a competitive, unregulated market by extending the ILEC monopoly to the Internet. OPUCT at 36 ("these proceedings may mark the end of the independent ISP industry").

specified in Allegiance's comments, and those cited in the comments filed by the public interest advocates, the Commission should abandon its proposal to mandate bill-and-keep for any class of traffic.

Respectfully submitted,

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